



LEGISLATIVE UPDATE

COVERING CRIMINAL JUSTICE LEGISLATIVE ISSUES

SUMMER 2006, No. 24

DEPARTMENT OF PUBLIC ADVOCACY

REALIZING TRUE JUSTICE BECOMES A POSSIBILITY: DPA FUNDED AT AN ADDITIONAL \$6.2 MILLION OVER BIENNIUM

By Ernie Lewis, Public Advocate

Kentucky avoided a serious crisis in its criminal justice system when policy makers agreed to fund an additional \$6.2 million in Kentucky's system of indigent defense over the next two years. By doing so, Kentucky averted a system where justice was seriously in jeopardy as a result of excessive public defender caseloads. As a result of this action, I am cautiously optimistic as the new year begins that justice can be enhanced as caseloads begin to decline throughout Kentucky's public defender system.

Justice Jeopardized Report Adopted by Public Advocacy Commission

Public defender caseloads have exploded in the last several years. From FY2000 to FY05 cases increased from 97,818 to 131,094, an increase of 37%. Cases increased from FY03 to FY04 by 12% in one year alone. In FY04, defenders opened an average of 489 new cases per lawyers per year, resulting in their having less than 4 hours to spend on each case. In response, at their October 2004 meeting, the Public Advocacy

Commission decided that the system was in crisis and that they needed to respond. The Commission held five public meetings across the Commonwealth at which over 200 people attended, including 4 Supreme Court Justices, 4 Court of Appeals judges, and numerous trial judges, prosecutors, defenders, and other criminal justice professionals. At the end of the process in September 2005, the Commission adopted a report. Their findings were as follows:

1. Kentucky public defenders have far too many cases. In FY04 & FY05, those caseloads were at 189% of national standards. These caseloads are jeopardizing the justice being provided to Kentucky's poor.
2. Defender caseloads in some offices are so high as to be unethical.
3. Kentucky public defenders are unable to perform many of the tasks performed by private defense counsel due to their excessively high caseloads. These tasks include such matters as litigating pretrial release decisions, preparing alternatives to incarceration, preparing pretrial motions, and answering client phone calls and correspondence. One of the unintended consequences of the lack of defender capacity is jail overcrowding and increased costs to counties.
4. Other components of the criminal justice system, including the judiciary and prosecutors, are aware of and affected by the increase in caseloads for public

Continued on page 2



Justice Jeopardized

INSIDE

- ◆ National Right to Counsel Comes to KY 4
- ◆ 2006 Criminal Justice Legislation 5
- ◆ PA Deliver's Keynote Address in New Orleans .. 17
- ◆ New Justice & Public Safety Cabinet Members 18
- ◆ Eyewitness ID Reforms are Effective 19

Continued from page 1

defenders. Many parts of the criminal justice system, including the judiciary and prosecutors, are supportive of relief for overworked public defenders. Some members of the judiciary noted that due to high caseloads defenders are not able to spend sufficient time to prepare major cases. In addition, excessive caseloads have caused delays in the processing of cases.

5. Kentucky's "War on Drugs" has had a serious impact on the criminal justice system, and particularly Kentucky's public defenders. This is particularly true where federally funded drug task forces are in existence.
6. Kentucky continues to fund its system of indigent defense at a level that is at the bottom of the nation based upon the cost-per-case benchmark. The Commonwealth of Kentucky is at risk for failing to provide sufficient resources for its indigent defense system. Unless there is a response to this campaign, there is the possibility of a "KERA-like" lawsuit challenging the constitutionality of Kentucky's system of indigent defense.
7. Private attorneys working as conflict counsel for DPA trial offices are not being paid sufficiently. In many instances, private attorneys are not being reimbursed for their costs, and are thus working pro bono on indigent defense cases.
8. The Department employs too few support staff in its field offices. As a result, attorneys are handling clerical matters such as typing and filing.
9. The Department employs too few investigators, particularly in larger field offices. As a result, defenders are trying to handle investigations for lower level felonies and misdemeanors with the potential for troubling ethical consequences.
10. The availability of social worker services is critical in order for public defenders to play the role that the criminal justice system expects of them.
11. There is a question whether the criminal justice system is doing an adequate job of determining eligibility. Some judges raised the issue of the verification of eligibility for those appointed a public defender. Some defenders supported the perception that people were being appointed a public defender who were not eligible, a perception with which other defenders disagreed.

The Commission made the following recommendations based upon these findings:

1. The criminal justice system should be understood as a system that requires resource parity among the different components. Policy makers should take steps to ensure that the key elements of Kentucky's criminal justice system, the courts, prosecution, and indigent defense, become and remain balanced throughout the courts, prosecution, and indigent defense.

2. The Commonwealth should fully fund the Kentucky public defender system. At a minimum, an additional \$10 million per year is necessary to bring Kentucky into the mid-level area in comparison with other programs in important benchmark areas such as cost-per-case.
3. Caseloads for trial attorneys should never be above 400 new mixed cases per lawyer per year.
4. When Drug Task forces provide adequate funding for law enforcement in a particular area, additional funding must be provided for public defenders, prosecutors, and courts.
5. When drug or family courts are created, additional funding must also be provided to public defenders, prosecutors, and courts.
6. Additional funding should be supplied for conflict attorneys in field offices.
7. Each public defender office in Kentucky should have on its staff a social worker who would help in juvenile court, in drug cases, and in preparation of alternative sentencing recommendations.
8. There should be 1 investigator for every 6 trial public defenders.
9. There should be 1 support staff member (secretarial or paralegal) for every 2 attorneys.
10. Consideration should be given by policy makers to establishing caseload limits in KRS Chapter 31 for trial level public defenders.

This report was then submitted to the Kentucky Bar Association Board of Governors by the Chair of the Public Advocacy Commission, Robert Ewald.

Kentucky Bar Association Supports Call for \$10 Million Annual Addition

On November 18, 2005, the Kentucky Bar Association Board of Governors adopted a resolution in response to the *Justice Jeopardized* report of the Public Advocacy Commission. The Board of Governors resolved "that the Board of Governors of the Kentucky Bar Association Calls Upon the Commonwealth of Kentucky" to:

- I. Fully fund the Kentucky public defender system in order to reduce excessive caseloads to no more than 400 new cases per year per lawyer to enable Kentucky's public defenders to provide competent and ethical representation to indigents accused of crimes and to provide adequate administrative support to public defender lawyers;
- II. To provide sufficient funding for private lawyers handling conflict cases to make the compensation significant rather than minimal.

III. To provide parity of resources among the different components of the criminal justice system in order to achieve a system that is balanced, efficient, and fair.

Governor Fletcher Responds Favorably to *Justice Jeopardized* Report

In December of 2005, Governor Fletcher was presented with the *Justice Jeopardized* Report and the KBA Board of Bar Governors' Resolution. Chief Justice Joseph Lambert, Justice Will Scott, Chief Judge of the Court of Appeals Sara Combs, Public Advocacy Commission Chair Robert Ewald, and myself were present with the Governor, his Chief of Staff Stan Cave, his Budget Director, Brad Cowgill, and others.

Following the meeting, Governor Fletcher presented his proposed budget to the General Assembly in January of 2006. In his budget, Governor Fletcher asked the General Assembly to fund the Department of Public Advocacy at \$3.0 million additional dollars in FY07 and \$3.2 million in FY08. The avowed purpose of this budget increase was to lower excessive public defender caseloads.

In his budget address, Governor Fletcher stated the following: "Before I close, let me say I've learned a great deal these two years as Governor...about life and about justice. Now, I have a greater appreciation for the rights of every individual. With that new insight, I want to commend Mr. Ernie Lewis for his work as our Public Advocate and to let all those, who defend those who can't defend themselves, know that I have added an additional \$6.2 million dollars for their work."

General Assembly Adopts Governor's Budget

The Executive Branch Budget was contained in House Bill 380. The General Assembly adopted the Governor's recommendation for the Department of Public Advocacy by passing HB 380. DPA's total budget is \$38,204,500 in FY07. In FY08, DPA's total budget is \$38,005,300.

The Adopted Budget Did Not Fully Fund the Public Defender System

The Public Advocacy Commission had called upon Kentucky public policy makers to fully fund the public defender system. A fully funded system would have cost \$10 million in additional General Fund dollars on an annual basis. A fully funded system was defined in the report as;

- ◆ Lower caseloads of trial attorneys to no more than 400 new cases per year per lawyer.
- ◆ Attorney to support staff ratio of 2:1
- ◆ Attorney to investigator ratio of 6:1
- ◆ A social worker in each office
- ◆ An increase of 25% in money for the conflict budgets going to defense counsel.

Instead of the requested \$10 million, DPA will be receiving \$3.0 million in the first year of the biennium and \$3.2 million in the second year of the biennium. As a result of the passage of HB 380, DPA will not be able to accomplish the following over the biennium:

- ◆ We will not be able to lower the attorney to support staff ratio. At present, one support staff person, usually a secretary, supports three lawyers. As a result of that, the *Justice Jeopardized* Report found significant inefficiencies, including attorneys performing clerical tasks.
- ◆ We will not be able to establish an attorney to investigator ratio of 6:1. At present, many DPA field offices with 8 attorneys or more have only 1 staff investigator. The result is that attorneys are performing their own investigations, investigators are overworked, and the system is not efficient as it otherwise could be.
- ◆ Only \$100,000 additional money will be made available to private attorneys handling conflict cases. The result will be more pro bono representation in conflict cases by private lawyers, and fewer private lawyers willing to participate.
- ◆ DPA will not be able to hire a social worker in every field office. Instead, the General Assembly funded a social worker pilot project of 3 social workers in FY07 and 1 additional social worker in FY08.

Public Defenders Will Be Realizing Justice During FY07

I am very appreciative of Governor Fletcher and the Kentucky General Assembly for their increasing the budget for indigent defense in the next two years. We are moving away from a criminal justice system in jeopardy. We will be moving toward realizing justice. We will do so in several ways.

First and most significantly, we will be reducing public defender caseloads significantly. The budget allows for the hiring of 53 new people in FY07 and 4 additional staff in FY08. 36 of those persons will be lawyers, while 14 people will be staff supporting the lawyers. DPA will place the new lawyers in the offices with the highest caseloads based upon our caseload management system. This should enable DPA to lower caseloads from 483 new cases per lawyer in FY05 to approximately 409 in FY07. In FY 08, 2 additional lawyer positions are funded as well as one support staff.

This progress is contingent upon the reversal of the trend over the past few years, that of caseloads increasing each year. Preliminary indications are that caseloads increased by approximately 1% in FY06, which would be good news indeed. DPA's Annual Caseload Report is expected to be out in September of 2006, which should confirm the preliminary indications.

This will have a significant effect on the delivery of public defender services. In previous years, DPA had 15 or more

Continued on page 4

Continued from page 3

offices with an excess of 500 new cases per lawyer annually. Each of our rural trial offices will be able to reduce their caseloads down to 430 or lower. Many of our rural trial offices will have caseloads below 400. The Louisville Metro Public Defender's Office will receive 9 new lawyers, allowing them to lower their caseloads to approximately 509 from 566 in FY05. In addition, the University of Kentucky through their Rural Drug Prosecution's Grant has funded attorney positions for defenders, prosecutors, and the Court of Justice, including 7 for DPA. The net effect will be to free up our lawyers to spend more than 4 hours per case, allowing them to conduct necessary preparation and investigation, allowing them to protect the rights of the innocent and improperly charged, and ultimately to realize justice throughout the criminal justice system.

A second part of the budget is the beginning of the social worker pilot project. The *Justice Jeopardized* Report called upon public policy makers to fund one social worker per trial office. The purpose of placing social workers in public defender offices, something that has been occurring throughout the nation for many years, is threefold: first, to allow for diversion of nonviolent offenders with substance

abuse and mental illness from the system entirely; second, to enable detailed alternative sentencing plans to be developed and presented to trial courts in order to reduce incarceration levels; and finally to allow for the preparation of fully fleshed out predisposition reports in juvenile cases. DPA fully believes that utilizing social workers will reduce recidivism and save significant costs of incarceration in our adult and juvenile systems.

Governor Fletcher agreed with this plan, but funded only 3 social workers for FY07 and 1 additional social worker for FY08. The General Assembly agreed in its passing of HB 380. As a result, DPA is now in the process of hiring 3 social workers, creating social worker standards, and ensuring that proper outcome measures are in place to demonstrate to policy makers that social workers can save the Commonwealth money.

Conclusion

We completed our full-time system at the trial level by opening an office in Glasgow in October of 2005. Now we will be lowering caseloads for our overworked public defenders. I am cautiously optimistic that we will begin realizing justice this year as a result. ■

NATIONAL RIGHT TO COUNSEL COMMITTEE COMES TO KENTUCKY

By Ernie Lewis, Public Advocate

On Wednesday, March 22, 2006, the Kentucky Department of Public Advocacy was visited by committee members from the National Right to Counsel Committee. This Committee is chaired by former Vice-President Walter Mondale and has been working to study the implementation of the right to counsel throughout the United States. We were visited by Hon. Rhoda Billings, former Chief Justice of the North Carolina Supreme Court and retired law professor from Wake Forest University School of Law, and Hon. Catherine Beane, director of the National Defender Leadership Institute with the National Legal Aid and Defender Association. They were able to interview Chief Justice Joseph Lambert, the Governor's Chief of Staff, Stan Cave, and Hon. Linda Tally Smith, Commonwealth's Attorney in Boone and Gallatin Counties. They also interviewed me and Jeff Sherr, Education and Strategic Planning Branch Manager for DPA, and reviewed numerous materials. We were informed that the Kentucky public defender system is viewed as a "best practices" state. A report is expected later this summer. ■

Prosecutors want capable defense attorneys in prosecutions to help prevent the unintentional conviction of an innocent person. Every conviction of an innocent person leaves the guilty person free to endanger our community....

- Honorable Robert Johnson, District Attorney for Anoka County, Minn. and National Right to Counsel Committee co-chair.

CRIMINAL JUSTICE LEGISLATION OF THE 2006 GENERAL ASSEMBLY

By Ernie Lewis, Public Advocate, and Margaret Case, General Counsel

The following is a review of all of the criminal justice legislation of the 2006 General Assembly. We hope that it is helpful to you. However, we encourage you to consult the statutory language under appropriate circumstances. The effective date of this new legislation was July 12, 2006.

House Bill 3: Sex, Juveniles, PFO, Violent Offender

Proponents of this bill presented it as having resulted from a series of public meetings held by the Kentucky Coalition Against Sexual Assaults. It is well over 100 pages long and covers many different matters, some of which are unrelated to sex offenses. The most important changes in the law are dealt with here.

State legislation pre-empts the field of sex offender and violent offender legislation.

- ◆ A new section of KRS Chapter 65, (“General Provisions Applicable to Counties, Cities, and Other Local Units”), states the General Assembly’s intent to occupy the entire field of laws relating to persons who have committed violent offenses defined in KRS 439.3401 and the following sex offenses:
 - A felony defined KRS Chapter 510, the sex offense chapter
 - KRS 530.020: incest
 - KRS 530.064(1)(a): First-degree unlawful transaction with a minor involving sexual activity
 - KRS 531.310: Use of a minor in a sexual performance
 - KRS 531.320: Promoting a sexual performance by a minor
 - A felony attempt to commit any of the above-listed offenses
 - Felonies, similar to the above-listed offenses, from the federal jurisdiction, U.S. military jurisdiction, or another state or territory.
- ◆ No political subdivision of the state may legislate in these areas. Any pre-existing ordinance, resolution, or rule in the area was rendered null, void, and unenforceable on July 12, 2006.

Changes to Penal Code offenses

- ◆ Third-degree rape, (KRS 510.060), third-degree sodomy, (KRS 510.090), and second-degree sexual abuse, (KRS 510.110), are expanded to include sexual intercourse, deviate sexual intercourse, and sexual contact with a person under 16, if the defendant came into contact with the person by being in a position of authority or special trust, as defined in KRS 532.045.

- ◆ First-degree sexual abuse, (KRS 510.110), becomes a Class C felony when the victim is under the age of 12.
- ◆ KRS 510.155 is amended. Cellular telephones are added to the list of electronic means by which one may not procure or promote the use of a minor in certain illegal sexual activity. And, the list of prohibited conduct in the statute is expanded to include third-degree rape, third-degree sodomy, first-degree promoting prostitution, and any Chapter 531 pornography offense.
- ◆ A new section of KRS Chapter 519, “Obstruction of Public Administration,” creates a new Class D felony: tampering with a prisoner monitoring device.
- ◆ Under an amended KRS 530.020, the crime of incest:
 - Stays a Class C felony if the act is committed by consenting adults,
 - Becomes a Class B felony if it is committed by forcible compulsion or involves a victim either under the age of 18 or incapable of consent because of physical helplessness or mental incapacitation, and
 - Becomes a Class A felony if it involves a victim who either is under the age of 12 or receives serious physical injury.

This new difference in classification makes the incest penalties an almost mirror image of the first-degree rape penalties.

- ◆ First-degree unlawful transaction with a minor is divided into two distinctly separate types:
 - KRS 530.064(1)(a) – Knowingly inducing, assisting, or causing a minor to engage in illegal sexual activity, and
 - KRS 530.064(1)(b) — Knowingly inducing, assisting, or causing a minor to engage in illegal controlled substances activity (other than activity involving marijuana).

Continued on page 6



Ernie Lewis



Margaret Case

Continued from page 5

The distinction is designed to prevent the unintended consequence of sex offender laws being applied to people whose crimes involved only controlled substances activity.

This change in the law necessitated amendments to many, many provisions throughout the Kentucky Revised Statutes, including various professional licensing statutes and KRS 421.350, which deals with a child's testimony being televised via closed circuit equipment. After the effective date of House Bill 3, anyone facing a situation that involves the alleged unlawful transaction with a minor should check on whether other relevant statutes have been changed.

- ◆ When a person employed by or working on behalf of a state or local agency is charged with an offense in KRS Chapter 510, the complaining witness is deemed incapable of consent if he or she was under the care or custody of that agency pursuant to court order. This provision does not apply if (a) the people are lawfully married to each other and (b) there was no court order against contact between them.
- ◆ Under the prior version of KRS 531.335, possession of matter portraying a sexual performance by a minor was a Class A misdemeanor for the first offense, with subsequent offenses being raised to Class D felonies. Under House Bill 3, all offenses, including the first, are Class D felonies.
- ◆ Distribution of matter portraying a sexual performance by a minor, (KRS 531.340), and advertising such material, (KRS 531.360), are raised to Class C felonies for subsequent offenses.

New offenses outside the Penal Code

- ◆ A new section of KRS 17.500-17.580 creates new offenses related to sex offender registration. Each of the following is a Class A misdemeanor for the first offense and a Class D felony for each subsequent offense:
 - Making a false and misleading statement regarding a noncompliant registrant to a law enforcement official, (which is very broadly defined).
 - Harboring a noncompliant registrant for the purpose of avoiding registration.
- ◆ Subsequent violations of the sex offender registration requirements of KRS 17.510 are now Class C felonies under KRS 17.510(11).
- ◆ Under KRS 17.510(12), subsequent convictions for giving false, misleading, or incomplete sex offender registry information are now Class C felonies.

Pre-trial release of alleged sex offenders

- ◆ KRS 431.520 is amended to mandate that, when an alleged sex offender is released on personal recognizance or unsecured bail bond, the court must consider requiring electronic monitoring and must consider requiring home incarceration.

Sex offender treatment programs

- ◆ The adult privilege statute, KRS 197.440, is amended, to specify that those sex offender treatment program communications are protected by the privilege are not subject to disclosure under KRS 620.030, which pertains to the duty of reporting dependency, neglect, or abuse.
- ◆ The juvenile privilege statute, KRS 635.527, is also amended. Its new language tracks the language of the adult statute, KRS 197.440, including the provision reported above concerning KRS 620.030.

Sex offender registration

- ◆ The list of offenders who are subject to mandatory registration, (KRS 17.500 et seq.), is expanded to also include:
 - Any person whose sexual offense has been diverted pursuant to KRS 533.020, until the diversionary period is successfully completed,
 - Any person convicted of first-degree unlawful transaction with a minor for having knowingly induced, assisted, or caused a minor to engage in illegal sexual activity, or an attempt to commit that offense, and
 - Any offense in KRS Chapter 531, ("Pornography"), or an attempt to commit such an offense, involving a minor or depictions of a minor.
- ◆ Notification to a sex offender about the registration requirement must be made
 - By the court, if no period of incarceration is imposed or if the offender is probated or conditionally discharged, or
 - By "the official in charge of the place of confinement," upon release from a period of incarceration.
- ◆ The person giving this notification must order the person to register with the appropriate local probation and parole office.
- ◆ The registrant must return to the appropriate local probation and parole office once every two years for a new photograph.
- ◆ A new section of KRS Chapter 439, ("Probation and Parole"), will require that officers be trained on the sex offender registration laws and be able to (a) register or re-register an offender and (b) answer questions about the registration law and its requirements. Also, the Justice Cabinet must provide each probation and parole office with copies, (for distribution), of the sex offender registration statutes, any administrative regulations concerning registration, a brochure explaining the registration requirements in lay person's terms, registration forms, fingerprint cards, etc.
- ◆ A sex offender from another jurisdiction, who (a) was notified about a registration requirement in the other jurisdiction, or (b) was committed as a sexually violent predator in the other jurisdiction, or (c) has a "similar conviction" from another country, must comply with Kentucky's registration law within five (5) working days of relocation to Kentucky.

- ◆ Within five (5) working days after obtaining a new residence, an offender must register with the probation and parole office in the county of the new residence.
- ◆ An offender's "residence" is any place where the offender sleeps. A single offender can have more than one residence and must register each one. It appears that the registration requirement is written broadly enough to necessitate registration during such periods as visits with relatives in their homes, vacations, and hospitalizations.
- ◆ KRS 17.510(7), which requires registration upon entering Kentucky for employment or study, now requires that the registration occur within five (5) working days.
- ◆ Anyone required to register under federal law or the laws of another state or territory shall be presumed to know of the duty to register in Kentucky.
- ◆ Duration of the registration requirement is also changed.
 - Lifetime registration due to prior convictions is now limited to just those prior crimes that are felonies; KRS 17.520(2)(a)(3) and (4) are amended.
 - Non-lifetime registration under KRS 17.520(3) is increased from ten to twenty (20) years.
- ◆ KRS 431.005 is amended, to specify that a peace officer may make a warrantless arrest when the officer has probable cause, based upon information from the Law Information Network of Kentucky, to believe that a person is out of compliance with sex offender registration requirements.
- ◆ Under prior law, a violation of sex offender registration requirements was a Class D felony. Under the new version of KRS 17.510(11), subsequent offenses are Class C felonies.
- ◆ Under prior law, the giving of false, misleading, or incomplete registration information was a Class D felony. Under the new version of KRS 17.510(12), subsequent offenses are Class C felonies.
- ◆ Registrant information on the Kentucky State Police website will be expanded under an amendment to KRS 17.580(1). New information on the website will concern the registrant's crime of conviction, the elements of the offense, whether the registrant is on probation or parole, and whether the registrant is in compliance with relevant laws.

Residence restrictions on sex offenders

- ◆ The class of sex offenders subject to residence restrictions is expanded. Under prior law, the restrictions applied to sex offenders who were on probation, parole, or other form of release. Under the new law, the restrictions apply to all persons required to be registered, including those who have served out their sentences or been discharged from parole.
- ◆ The list of places, from which a sex offender's residence must be at least 1000' away, is expanded. Under pre-existing law, a sex offender could not reside within 1000' of a high school, middle school, elementary school, preschool, or licensed day care facility. Under the new law, that list includes a "publicly owned playground." (KRS 17.495 is amended.)
- ◆ The way to measure the 1000' has also been changed. Previously, the measurement was between the walls of the relevant buildings. Under the new law, that measurement is "from the nearest property line of the school to the nearest property line of the registrant's place of residence."
- ◆ A registrant's "residence" is any place where the registrant sleeps. A registrant may have more than one residence and is required to register each of them.
- ◆ As of the new law's effective date, (July 12, 2006), any registrant living within 1000' of a facility on the prohibited list was required to move within 90 days.
- ◆ If a new facility opens within 1000' of a registrant's residence, the registrant is presumed to know about it and must move within 90 days to a place more than 1000' away from any facility of the type on the prohibited list.
- ◆ Violation of the residence restrictions is a Class A misdemeanor for the first offense and is a Class D felony for each subsequent offense.

Juveniles

- ◆ KRS 17.170 is amended. The Department of Juvenile Justice shall take a DNA sample from any youthful offender who is in the Department's custody by virtue of a felony sex offense conviction under KRS Chapter 510 or incest under KRS 530.020. The sample will be for law enforcement identification purposes and inclusion in law enforcement identification databases.
- ◆ Under an amended KRS 640.030, the list of crimes for which youthful offenders must be provided sex offender treatment by DJJ is changed to:
 - A felony defined KRS Chapter 510
 - KRS 530.020: Incest
 - KRS 530.064(1)(a): First-degree unlawful transaction with a minor involving sexual activity
 - KRS 531.310: Use of a minor in a sexual performance
 - KRS 531.320: Promoting a sexual performance by a minor
 - A felony attempt to commit any of the above-listed offenses
 - Felonies, similar to the above-listed offenses, from the federal jurisdiction, U.S. military jurisdiction, or another state or territory.
- ◆ Under prior law, a participant in the DJJ sex offender treatment that is mandated by KRS 635.515 could not be kept in the program for more than three (3) years. House Bill 3 provides that the treatment may be extended for one (1) additional year if the sentencing court orders such extension upon DJJ's motion. Also, the amendment removes the old provision about a person in DJJ custody, who reaches the age of 19 before completing treatment or at least finishing three (3) years of it, being returned to the sentencing court, which may order completion of treatment.

Continued on page 8

- ◆ KRS 17.495, (on residency restrictions for sex offenders), is repealed. It is replaced by a new section of KRS 17.500-17.580. A description of the new residency restrictions appears above, in a separate section. But, one change applies specifically to juveniles. Prior law exempted probated and paroled youthful offenders from the residency restrictions, during their minority or while enrolled in secondary education programs. This exemption has now been expanded to include persons enrolled in elementary education programs.
- ◆ KRS 196.280, concerning the Department of Corrections' system for providing the public with notice of offender releases and escapes, is amended to include releases and escapes from a "facility for youthful offenders." The prior language was "juvenile detention facility."
- ◆ KRS 605.090 is amended
 - to permit foster parents, custodians, private facilities, and governmental entities to share otherwise confidential information about a child for the protection of any child, and
 - to require that a child committed under KRS Chapter 620 for commission of a sex crime must be kept segregated from other children in the same home, facility, or other shelter, who have not been committed because of commission of a sex crime.
 - KRS 620.090 and KRS 620.230 are similarly amended.
- ◆ Access to juvenile court records:
 - KRS 610.320(3) is amended, to require that court clerks keep a separate record covering court documents that are accessible to the public in juvenile delinquency proceedings concerning children at least fourteen (14) years or older at the time of the offense.
 - KRS 610.340(7) is amended, to require that juvenile records, obtained by officials engaged in the investigation and prosecution of cases, may be used for official use only, shall not be disclosed publicly, and are exempt from disclosure under the Open Records Act (KRS 61.870 to 61.884).
 - Under an amended KRS 610.345, the juvenile court is required under certain circumstances to direct or authorize, (depending upon the circumstances), the prosecution to give the child's school district or school a statement of facts in the case. The change to pre-existing law is in removing the court's discretion whether or not to authorize the prosecution to disclose the facts.
 - There has been much discussion and confusion over the extent to which House Bill 3 changes the law on public access to juvenile court records. In sum, the bill does not open to the public any records that were previously kept confidential. Rather, the bill simply (a) provides a more efficient way for the public to find those particular records that are open to the public,

(b) specifies how juvenile records that are disclosed to law enforcement officials must be kept confidential by those officials, and (c) mandates that relevant school officials be told about the facts in certain cases.

Persistent felony offenders

- ◆ KRS 532.080(3), as amended by House Bill 3, will extend first-degree PFO status to a person who stands convicted of a felony after having been convicted of one (1) or more prior felony sex crimes against a minor. The new offense does not have to be either a sex crime or an offense against a minor. The bill is unclear as to what constitutes a prior "felony sex crime against a minor."
- ◆ A first-degree persistent felony offender, being sentenced for a current sex crime committed against a minor, may be sentenced up to life imprisonment without parole for twenty-five (25) years, if:
 - The current offense is a Class A or B felony, **or**
 - The person was previously convicted of at least one sex crime committed against a minor.

The amendment is somewhat unclear as to what constitutes a "sex crime committed against a minor." But, it is clear that the amendment intends to extend greatly the number of people in Kentucky against whom LWOP-25 sentencing is possible.

- ◆ KRS 532.080(7) is amended so that the eligibility for certain first-degree persistent felony offenders to be probated, shock probated, or conditionally discharged is denied to a person who stands convicted of a sex crime. The amended statute is somewhat ambiguous as to whether only a current "sex crime" disqualifies the person from these forms of release. At least one commentator has opined that any "sex crime" conviction, past or current, triggers the disqualification.

Violent offenses" under KRS 439.3401

- ◆ The list of "violent" offenses is greatly changed, with one deletion from the list and several additions.
- ◆ The new, longer list reads as follows:
 - A capital offense
 - A Class A felony
 - A Class B felony involving the death of the victim or serious physical injury to a victim;
 - The commission or attempted commission of a felony sexual offense in KRS Chapter 510;
 - Use of a minor in a sexual performance as described in KRS 531.310;
 - Promoting a sexual performance by a minor as described in KRS 531.320;
 - Unlawful transaction with a minor in the first degree involving sexual activity
 - Promoting prostitution in the first degree as described in KRS 529.030(1)(b);

- Criminal abuse in the first degree as described in KRS 508.100;
- Burglary in the first degree accompanied by the commission or attempted commission of an assault described in KRS 508.010, 508.020, 508.032, or 508.060;
- Burglary in the first degree accompanied by commission or attempted commission of kidnapping as prohibited by KRS 509.040; or
- Robbery in the first degree
- ◆ House Bill 3 deletes one “violent offense” from the new list: first-degree burglary accompanied by the commission or attempted commission of a felony KRS Chapter 510 sexual offense.
- ◆ Although many new offenses are now called “violent” under KRS 439.3401, the statute’s 85% parole eligibility rule still applies only to Class A and B felonies. For Class C and D felonies, the only effect of being denominated “violent” appears to be the KRS 439.3401(4) restrictions on the availability of credits against sentence.
- ◆ There is no language in House Bill 3 to limit application of the amended statute to crimes committed after the effective date of the new laws.

Criminal records checks

- ◆ The pre-existing KRS 17.165 prohibited child care centers from employing, (in a position involving direct contact with a minor), any person who is a violent offender or has been convicted of certain enumerated sex crimes. House Bill 3 amends the statute, to add the following new sex crimes to the list:
 - All felony offenses in KRS Chapter 510, (rather than just the selected Chapter 510 offenses currently on the list)
 - KRS 530.064(1)(a) – First-degree unlawful transaction with a minor involving sexual activity (NOTE: The legislature deleted second-degree unlawful transaction from the list.)
 - A felony attempt to commit a felony offense in the two categories described above
 - Felonies, similar to the above-listed offenses, from the federal jurisdiction, U.S. military jurisdiction, or another state or territory.
- ◆ For changes to the list of “violent offenses.” See immediately above for the section on KRS 439.3401.
- ◆ KRS 160.151 and 160.380 are amended. Schools, school boards, and school superintendents may require volunteers, visitors, contractors, and contractor employees to submit to national and state criminal history checks.
- ◆ A new section of KRS Chapter 164, (pertaining to public colleges and universities), requires criminal history background checks on all new hires. Such checks on visitors, volunteers, contractors, and contractor employees are discretionary. The new section authorizes

various actions when the background check reveals a prior sex crime or violent offense, including denial of employment, modification of employment conditions, denial of entry, and the requirement of special supervision. If a previously-hired employee is convicted of a sex crime or violent offense, that person’s employment may be terminated.

Additional provisions regarding sentencing

- ◆ KRS 532.110 is amended to require that sentences for two or more felony sex crimes involving two or more victims must run consecutively.
- ◆ KRS 439.265(5) is amended, to specify that the only unlawful transactions with a minor that preclude the defendant from consideration for probation or conditional discharge are those unlawful transactions that involve sexual activity.
- ◆ KRS 533.030 is amended to provide that the restitution mandated in cases of probation or conditional discharge may include relocation expenses incurred by a victim who moved for the purpose of his/her own safety or the safety of someone in the victim’s household. This provision applies in cases of both sex and non-sex crimes.

Miscellaneous provisions

- ◆ The mandatory three-year period of post-release conditional discharge for sexual offenders is increased to five years. (KRS 532.043 and 532.060 are amended.)
- ◆ KRS 533.250 is amended, to preclude pretrial diversion for anyone convicted of:
 - A felony defined KRS Chapter 510
 - KRS 530.020: Incest
 - KRS 530.064(1)(a): First-degree unlawful transaction with a minor involving sexual activity,
 - KRS 531.310: Use of a minor in a sexual performance
 - KRS 531.320: Promoting a sexual performance by a minor
 - A felony attempt to commit any of the above-listed offenses
 - Felonies, similar to the above-listed offenses, from the federal jurisdiction, U.S. military jurisdiction, or another state or territory.

People on diversion when the law went into effect may remain on diversion as long as they continue to meet diversion and sex offender registration requirements.

- ◆ KRS 197.045(4) is amended to clarify that restrictions on good time credits apply to “eligible sex offenders.”
- ◆ KRS 532.100 is amended to specify that when an indeterminate sentence of at least two (2) years is imposed for a felony sex crime or any similar offense in another jurisdiction, the sentence shall be served in a state institution.

Continued on page 10

- ◆ KRS 441.046 is amended to mandate that a person who is arrested or detained in an adult or juvenile detention facility shall be fingerprinted before release and a copy of the fingerprints must be transmitted to the Kentucky State Police. Sanctions are imposed on jailers who do not comply.

Senate Bill 38: Self Defense

- ◆ This is the bill that states specifically that there is no duty to retreat, amending KRS Chapter 503.
- ◆ The heart of the bill is the following: “A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a felony involving the use of force.”
- ◆ The definition of “dwelling” under KRS 503.101(2) is amended to read that it is a “building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night.” Note that this is a different definition from that contained in the burglary statute, KRS 511.010(2), which defines dwelling as “a building which is usually occupied by a person lodging therein.”
- ◆ “Residence” is defined as a “dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.”
- ◆ “Vehicle” means a “conveyance of any kind, whether or not motorized, which is designed to transport people or property.”
- ◆ A presumption is established that a person who uses “defensive force” against another did so while holding a “reasonable fear of imminent peril of death or great bodily harm to himself or herself or another” when two conditions exist: first, that the person against whom force was used (the victim) was unlawfully and forcibly entering a dwelling, residence, or occupied vehicle, or was removing a person against that person’s will from the place, and; second, that the person using the force knew about the unlawful entry.
- ◆ The presumption cannot be used if the victim had a right to be in the place, if the alleged kidnapped person was a child or grandchild of the victim, if the person using the force is committing a crime or using the place to commit a crime, or if the victim is a peace officer acting during the performance of her duties and the officer identified herself or the person using the force knew or reasonably should have known that the person is a peace officer.
- ◆ A second presumption is created that a person who unlawfully and forcibly enters a person’s dwelling, residence, or occupied vehicle is “doing so with the intent to commit an unlawful act involving force or violence.”
- ◆ KRS 503.050(2) is amended to expand the right to use deadly physical force to include that the defendant may use deadly physical force when he is trying to protect himself from a “felony involving the use of force,” or under the other circumstances detailed above. Likewise, KRS 503.070 is amended to accomplish the same thing for the use of deadly physical force in protection of another. Both new provisions specifically direct that a person has no “duty to retreat.”
- ◆ KRS 503.080 is expanded to allow for the use of physical force and deadly physical force to protect property to prevent a robbery “or other felony involving the use of force” or other circumstances detailed above.
- ◆ A person using force as described above is “justified” and “immune from criminal prosecution and civil action” for using the force unless she is a peace officer.
- ◆ Law enforcement may not “arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.”
- ◆ In a civil action brought against a person using force, the court shall award attorney’s fees, court costs, compensation for loss of income, and expenses if the court finds that the person using the force is “immune from prosecution.”

House Bill 380: Executive Branch Budget

- ◆ A biennial budget was passed for the Executive Branch. In many ways, this expresses the policies, including criminal justice policies, for the Commonwealth. Referral to the complete copy of this bill would be necessary to understand all of its provisions. The following are among its many provisions.
- ◆ **Drug Courts.** \$1.3 million in FY07 and \$1.8 million in FY 08 is transferred to ODCP for drug courts from the Local Government Economic Development Fund.
- ◆ **Operation Unite.** \$1.25 million in FY07 & in FY08 are allotted to ODCOP for Operation Unite “in relation to the Federal Task Force on Drug Abuse” from the Local Government Economic Development Fund.
- ◆ **Attorney General.** \$25.8 million in FY07 and \$25.7 million in FY08 are allotted to the Office of the Attorney General. \$275,000 is allotted for purposes of expert witnesses as a necessary governmental expense.
- ◆ **Unified Prosecutorial System.** Commonwealth’s Attorneys receive \$32.1 million in FY07 and \$32.9 million in FY08. County Attorneys receive \$27.3 million in FY07 and \$28.2 million in FY08. Together, PAC receives \$59.5 million in FY07 and \$61.2 million in FY08.
- ◆ **Crime Victims’ Compensation.** This Board is funded as part of the Board of Claims at \$3.5 million in FY07 and

\$3.3 million in FY08. Language requires examinations for reported victims of sexual assault to be paid by the Crime Victims' Compensation Board.

- ◆ **Children's Advocacy Centers.** As part of the Human Support Services Budget, each regional Children's Advocacy Center has its base budget increased by \$32,000 per year. In addition, funding is included by \$34,600 "provided that the Center has on staff, or can document the intent to employ or contract for, a qualified forensic interviewer at least half-time."
- ◆ **Regional Rape Crisis Centers.** These centers have their base budget increased by \$66,600 for each region "to cover increased levels of client service needs and increased cost of center operations."
- ◆ **Domestic Violence Statewide Programs.** These programs have their base budgets increased by \$45,000 for each region to also cover increased levels of client service needs.
- ◆ **Justice Cabinet Administration.** \$28.6 million in FY07 and \$28.8 million in FY08 is allotted to the Justice Cabinet for administration. This is down from \$31.8 million in FY06. This includes \$1.3 million in FY07 and \$1.8 million in FY08 for ODCP in restricted funds, and an additional \$1.8 million in FY07 and \$1.9 million in FY08 for ODCP from tobacco settlement funds. This also includes \$1.5 million each year of the biennium as a pass through for civil legal services. \$1.25 million is allotted to Operation Unite. Finally, \$1 million is allotted to ODCP to maintain existing multijurisdictional drug task forces and to expand "under served and unserved areas to assist local and state law enforcement agencies in a proactive effort to combat drugs and crime."
- ◆ **Department of Criminal Justice Training.** DOJT receives \$48.2 million in FY07 and \$48.6 in FY08, mostly from restricted funds. This includes \$3100 in "incentive" payments to individual KSP troopers for training. This is up from \$45.4 million in FY06.
- ◆ **Department of Juvenile Justice.** DJJ receives \$110,925,900 for FY07 and \$112,344,900 for FY08. This is up from \$106.9 in FY06. There is an exception in the budget to allow Madison County to house their juveniles in the detention facility.
- ◆ **Kentucky State Police.** KSP is funded at \$149.8 million in FY07 and \$157.2 million in FY08. This is up from \$141.2 million in FY06. This includes an authorized strength level of 1070 troopers.
- ◆ **Department of Corrections.** DOC is funded at \$397,466,100 for FY07 and \$417,615,800 for FY08. This is up from \$371,510,700 in FY06. This includes \$22.9 million for both years of the biennium for Corrections Management.
 - The budget includes the following language: "The Kentucky Commission on Services and Supports for Individuals with Mental Illness, Alcohol and other Drug Abuse Disorders, and Dual Diagnoses shall, in its annual review of the Commission plan, include in

its duties recommendations for improvements in identifying, treating, housing, and transporting prisoners in jails and juveniles in detention centers with mental illness..."

- \$239.3 million is allotted for FY07 and \$246.3 million in FY08 for adult correctional institutions.
- KCTCS is mandated to provide adult basic education classes aimed at getting GED degrees.
- \$118.9 in FY07 and \$132 million in FY08 is allotted for community services and local facilities.
- Payments to local jails to meet their per diem amounts are deemed to be necessary governmental expenses (and thus do not have to remain within the allocation).
- \$4 million in FY07 and \$1.5 million in FY08 is to be allocated for local correctional facility and operational support.
- \$1 million is added for an increase in the per diem rate to counties for housing state inmates.
- Funds allocated for local jail per diem payments and halfway house payments "may also be used for the establishment and operation of an intensive secured substance abuse recovery program for substance abusers who have been charged with a felony offense."
- \$16.2 million is allocated for each year of the biennium for local jail support.
- \$931,100 in both years of the biennium is allocated for medical care contracts to counties for partial reimbursement. "in no event shall this apply to expenses of an elective, opposed to emergency, basis..."
- \$960,000 is allocated for each year of the biennium to each county with a life safety jail or closed jail.
- ◆ **Department of Vehicle Enforcement.** DVE is funded at \$20.8 million in FY07 and \$20 million in FY08. This is similar to the \$20.5 million in FY06.
- ◆ **Department of Public Advocacy.** DPA is funded at \$38.2 million in FY07 and \$38 million in FY08. This is up from the adjusted FY06 budget of \$34 million. \$6.8 million in revenue is authorized to be spent in FY07, and \$4.4 million in FY08. General Fund dollars increase from \$29.7 in FY07 to \$31.8 million in FY08. DPA is authorized to continue to suspend Block 50 payments and convert those payments into sick leave for attorneys.
- ◆ **Justice and Public Safety Cabinet.** The total Justice Cabinet budget is \$794,065,000 for FY07 and \$822,831,100 for FY08.
- ◆ **Salaries for State Employees.** The statutory 5% salary increment is again suspended. In its place is a sliding scale depending upon base salary. For those earning \$0 to \$30,000, a \$1350 increment will be added each year of the biennium. For those earning \$30,000.01 to \$50,000, \$1200 will be added. For those earning \$50,000.01 to \$60,000, \$1000 will be added. For those earning \$60,000.01

Continued on page 12

Continued from page 11

to \$80,000, \$600 will be added. Finally, for those earning \$80,000.01 and above, \$400 will be added.

- ◆ **Home Incarceration.** The budget bill includes a permanent change to KRS 532.260. The statute is amended to extend the present statute applicable to persons in a state-operated prison to allow for someone serving time for a Class C or D felon in a contract facility or a county jail to serve his or her sentence on home incarceration. It also changes the persons who are eligible from those with 60 days to serve to 90 days to serve.

House Bill 382: The Judicial Branch Budget

- ◆ This is the judicial branch budget. In FY 07 the Court of Justice is funded at \$268,139,100. For FY08, the Court of Justice is funded at \$302,893,100.
- ◆ Employees in the Court of Justice will be receiving similar sliding scale salary increases to state employees.
- ◆ Eight Circuit Court Judgeships authorized by the 2005 General Assembly received funding. In addition, 7 new judgeships are added in the 4th, 9th, 14th, 39th, 49th, 54th, and 57th Judicial Circuits.
- ◆ Three new District Court Judgeships are added in the 6th, 8th and 25th Judicial Districts
- ◆ General Fund money is allotted to replace federal funds for existing drug court sites. In addition, money is appropriated for FY08 to expand eight existing drug courts and to begin 20 new drug courts.

House Bill 117: Helmets for Kids on ATVs; Primary Enforcement of Seat Belt Law

- ◆ This bill is primarily a series of public health measures. Among its many provisions it mandates that persons 16 or older operating an all-terrain vehicle on public property must wear "approved protective headgear." Exceptions to this requirement are for farming, mining, agriculture, logging, other business, industrial, or commercial activity, or use of an ATV on private property.
- ◆ It also mandates that persons under the age of 16 shall wear "approved protective headgear" when riding on or operating an all terrain vehicle. There are no exceptions to this requirement.
- ◆ The bill also prohibits operating a vehicle manufactured after 1981 that doesn't have a seat belt. Failure to have a seatbelt while operating a vehicle becomes a primary offense. A conviction for violating this provision is not sent to the Transportation Cabinet, and it is not part of the person's driving record. A prepayable fine of up to \$25 without court costs is the penalty. Law enforcement is prohibited from erecting roadblocks to enforce this provision.

House Bill 272: Vehicles in Accidents

- ◆ This bill amends several provisions of KRS 189.
- ◆ Operators of a vehicle that is involved in a minor accident

on an interstate or parkway must move it out of the highway close to the accident. The operator may authorize others to move the vehicle as well, and the police may take it upon themselves to similarly move the vehicle.

- ◆ Where a death or injury accident occurs, an officer may move the vehicle without consent of the operator only after all medical assistance and cleanup have occurred.
- ◆ Where a death or injury accident occurs, the operator has a responsibility to notify law enforcement of that fact if he has a cell phone. Failing that, the responsibility rests with the owner of the vehicle or an occupant of the vehicle.
- ◆ Where an accident involving death or injury occurs on a highway and is not investigated by law enforcement, the operator must file a written report with KSP with 10 days of the accident.

Senate Bill 44: Actions required after certain highway accidents

- ◆ KRS 189.580 is amended to specify the actions that various individuals are required to take after a highway accident. Only two new requirements carry penalties for a violation.
- ◆ Under the new KRS 189.580(6)(a), if there is a fatality, or a known or visible personal injury, or damage rendering a vehicle inoperable, the operator must notify a public safety entity if the person has a communications device - Penalty: \$20-100 fine.
- ◆ Under the new KRS 189.580(7), if the accident results in death, personal injury, or property damage over \$500, and if law enforcement does not investigate, the owner of a vehicle involved must file a state police report within 10 days - Penalty: \$20-100 fine.

House Bill 90: Drivers' license for juveniles

- ◆ This bill pertains to drivers' licenses for juveniles and amends KRS 186.
- ◆ The bill expands the graduated licensing for juveniles. It requires a person between 16 and 18 to obtain an instruction permit for 180 days before obtaining what is known as an intermediate license. The intermediate license also lasts for 180 days, after which a person can obtain an operator's license.
- ◆ A person with an instruction permit under the age of 18 can only drive with 1 other person under the age of 20. A violation of this provision is not a primary offense. If a person with an instruction permit drives without the permit being in his possession, or if he or she operates the vehicle between 12:00 midnight and 6:00 a.m., or he or she drives with more than one person under 20, or he or she commits a moving violation for which points can be assessed, or he or she violates KRS 189A.010(1), another 180 days will be added on to the instruction permit.

- ◆ A person may obtain an intermediate license at 16 ½ years of age, so long as she has had an instruction permit for 180 days without a violation of the provisions in the above paragraph. In addition, she must have a statement presented to the state police attesting to having driven 60 hours under supervision, with 10 of those hours being at night. An intermediate license cannot be used to drive between 12:00 midnight and 6:00 a.m. Nor shall he operate a vehicle with more than 1 person under the age of 20. This is not a primary violation either. A similar 180 add-on operates under the intermediate license provisions.
- ◆ An operator's license may be obtained at 18 after holding an intermediate license for 180 days with no violations and after having completed a driver's training program.

House Bill 67: Drug related deaths and vehicular accidents

- ◆ This is a bill that effects both the Medical Examiner's Office under KRS Chapter 72 and an accident involving a fatality under KRS 189A.105.
- ◆ The Medical Examiner's Office is required to prepare an annual report to the Justice Cabinet Secretary reporting on the number of drug-related deaths, where they occurred, and the specific drugs involved.
- ◆ KRS 189A.105(2)(b) is amended to mandate that the officer investigating a fatal traffic accident seek a search warrant "for blood, breath, or urine testing." Where the testing demonstrates the presence of alcohol or drugs and the defendant is convicted of an offense arising out of the accident, the cost of the testing must be borne by the defendant.

House Bill 129: Fraudulent use of driver's license

- ◆ KRS 186.560 is amended to clarify that a person under the age of 21, who is convicted of purchasing or attempting to purchase alcoholic beverages by either (a) fraudulent use of a driver's license or (b) use of a fraudulent driver's license, shall have his or her license revoked for six months, or shall be denied a license for that period of time, with increasing periods of revocation for subsequent convictions of any offense listed in the statute.

Senate Bill 93 AND House Bill 333: Maintaining the peace at funerals and burials

- ◆ These bills affect KRS Chapter 525, "Riot, Disorderly Conduct, and Related Offenses."
- ◆ The bills are virtually identical. The one difference is highlighted in the text below.
- ◆ A new section of Chapter 525 creates the new Class B misdemeanor of "interference with a funeral"; a person commits the new crime in one of three ways:
 - By obstructing or interfering with access into or from any building or parking lot of a building, or parking lot

of a cemetery, in which a funeral, wake, memorial service, or burial is taking place; or

- By congregating, picketing, patrolling, demonstrating, or entering an area within 300 feet of a funeral, wake, memorial service, or burial; or
- By doing either of the following without authorization:
 - Making sounds or images observable to, or within earshot of, participants in a funeral, wake, memorial service, or burial, or
 - Distributing literature or any other item.
- ◆ There are now two degrees of "disrupting meetings and processions," rather than a single offense.
 - The old "disrupting meetings and processions" under KRS 525.150 becomes "disrupting meetings and procession in the second degree." It remains a Class B misdemeanor.
 - A new section of KRS Chapter 525 creates the new Class A misdemeanor offense of "disrupting meetings and processions in the first degree"; a person commits the new offense by, (with the intent to prevent or disrupt a funeral, burial, funeral home viewing, funeral procession, or memorial service), doing any act tending to obstruct or interfere physically, or making any utterance, gesture, or display designed to outrage the sensibilities of those attending.
- ◆ There are now two degrees of "disorderly conduct," rather than a single offense. The old "disorderly conduct" under KRS 525.060 becomes "disorderly conduct in the second degree." It remains a Class B misdemeanor
 - A new section of KRS Chapter 525 creates the new Class A misdemeanor offense of "disorderly conduct in the first degree"; there are three elements to the new offense:
 - Being in a public place and, with intent to cause, or wantonly creating a risk of, public inconvenience, annoyance, or alarm:
 - Engaging in fighting or in violent, tumultuous, or threatening behavior,
 - Making unreasonable noise, or
 - Creating a hazardous or physically offensive condition by any act that serves no legitimate purpose; and
 - Acting in any of the above-listed ways within 300 feet of a cemetery during a funeral or burial, a funeral home during the viewing of a deceased person, a funeral procession, or ***a funeral or memorial service, (House Bill 333 says "building in which a funeral or memorial service is being conducted")***; and
 - Knowledge that an occasion listed above is occurring within 300 feet.

Continued on page 14

House Bill 290: Carrying Concealed Deadly Weapons

- ◆ This bill amends the Carrying Concealed Deadly Weapon law of KRS Chapter 237. It authorizes the Kentucky State Police to renew licenses to carry concealed firearms or other deadly weapons.
- ◆ The bill explicitly states that a license to carry a concealed deadly weapon permits the holder to carry firearms, ammunition, and other deadly weapons, “at any location in the Commonwealth.” Thus, unless another section of the law precludes the carrying of the weapon, there remains a right to carry it. In addition, the bill ensures that the right includes the right to carry the firearm or deadly weapon “on or about his or her person.”
- ◆ Licenses last for 5 years.
- ◆ Prior to issuing a license, KSP is required to conduct a background check both at the state and federal levels.
- ◆ Licenses must be issued if: the person is not statutorily precluded from having a license, is a citizen of the US and a resident of the Commonwealth for 6 months, is a citizen and a member of the Armed Forces of the US and on active duty and has been in Kentucky for 6 or more months, is 21 years of age or older, has not been a substance abuse offender within the past 3 years, is not a chronic and habitual alcohol abuser, does not owe 1 year’s worth of child support, has not been convicted of assault 4th or terroristic threatening in the 3rd degree during the past 3 years (KSP may waive this provision), and demonstrates competence with a firearm by completing a firearm safety course.
- ◆ Current and retired federal peace officers are deemed to have met the training requirements for obtaining a license.
- ◆ Previous provisions precluding one committed under KRS 202A or 202B were eliminated.
- ◆ KSP is precluded from releasing the entire list of persons with a license, in toto or in a particular geographic area.
- ◆ The commissioner of KSP is authorized to revoke the license of a person who becomes permanently ineligible to hold a license. A person whose license is revoked may have a hearing on the issue before a hearing officer. Failure to surrender a suspended or revoked license is a Class A misdemeanor.
- ◆ The license must be carried at the same time the person is carrying the weapon or ammunition.
- ◆ Concealed deadly weapon class applicant, instructor, and instructor trainer information and records are to be confidential unless authorized by the trainer.
- ◆ The bill eliminates random inspections of certified firearms instructor classes and trainers.
- ◆ The bill claims the exclusive right to revoke or suspend licenses. No one else, and no government, may do so.
- ◆ During a disaster or emergency “no person, unit of government, or governmental organization” shall revoke

or suspend “or otherwise impair the validity of the right of any person to purchase, transfer, loan, own, possess, carry, or use a firearm...” whether they have a license or not. Nor may anyone during a disaster or emergency seize or confiscate a weapon or firearm from any person, whether they own a license or not. This right applies to any relocation to temporary housing during or after the disaster or emergency. This limits the right of the Governor to exercise emergency power during a disaster or emergency pursuant to KRS Chapter 39A.

- ◆ No one, including employers, may prohibit a person from possessing a firearm or ammunition in a vehicle, unless they are prohibited by law from that possession.
- ◆ A person may remove a firearm from a vehicle “in the case of self-defense, defense of another, defense of property.”
- ◆ Employers who violate the law regarding employees’ rights are liable in civil court for damages.

House Bill 193: Inmate lawsuits

- ◆ KRS 454.415 is amended to require exhaustion of administrative remedies within the Department of Corrections before an inmate may bring an action challenging prison conditions.
- ◆ Also, the statutory exhaustion requirement is extended to include actions brought “on behalf of an inmate,” (rather than just those brought by the inmate himself or herself), relating to prison disciplinary proceedings, challenges to sentence calculations, challenges to custody credit, and challenges to prison conditions.
- ◆ Eliminated is the prerogative of a court to continue an action while administrative remedies are exhausted.

House Bill 530: Jail canteen accounts

- ◆ KRS 441.135 previously required that canteen profits be used for prisoner “benefit or recreation.” The new law says that profits shall be used for “the benefit and to enhance the well being of the prisoners,” and it specifies that authorized expenditures “shall include but not be limited to recreational, vocational, and medical purposes.”
- ◆ Beginning July 1, 2007, fiscal courts must keep a certain, specified level of funds in the canteen accounts, based upon the average daily number of inmates in the population.

House Bill 616: Private adult prison facilities

- ◆ KRS 197.510 previously specified that each resident must be provided with a minimum of sixty (60) square feet of floor space in “the sleeping area of the adult correctional facility.” This bill modifies it to require sixty (60) square feet of floor space in “the living area of the adult correctional facility.”
- ◆ In private adult prisons, the minimum age for security employees is reduced from 21 to 18 years of age.

House Bill 258: Jail evacuation plans

- ◆ A new section is added to KRS Chapter 441 on “Jails and County Prisoners.”
- ◆ The Department of Corrections must develop evacuation and relocation protocols for local and regional jails, to be used in emergencies that render a facility temporarily or permanently uninhabitable. DOC has 180 days to promulgate regulations.
- ◆ Each jailer must develop an evacuation and relocation plan based on DOC’s protocols and must submit it to the county legislative body for compatibility with relevant plans for local emergency operations. Plans must be completed and transmitted to DOC by January 31, 2008.
- ◆ If DOC finds a jailer’s plan to be deficient, DOC must notify the judge executive and jailer of every county that houses prisoners at the jail in question. DOC may itself impose sanctions.
- ◆ DOC is authorized to consult and collaborate with the Jail Standards Commission. DOC may delegate to the Commission the responsibility of developing the evacuation and relocation protocol.

House Bill 289: Computer assisted remote hunting

- ◆ This bill creates a new section of KRS 150. It outlaws “computer-assisted remote hunting”, defined as “the use of a computer or any other device, equipment, or software to remotely control the aiming and discharge of a rifle, shotgun, handgun, bow and arrow, cross-bow, or any other implement to hunt or harvest wildlife in the Commonwealth.”
- ◆ The bill excepts those persons who are disabled and use technological means to hunt.
- ◆ The penalty for a violation of this act is a fine from \$100-500 or up to six months in jail or both.

Senate Bill 49: Gift cards issued by merchants

- ◆ A new section is added to KRS Chapter 244, (“Alcoholic Beverages; Prohibitions, Restrictions, and Regulations”) — No person under the age of twenty-one (21) may redeem a gift card or any portion of a gift card for the purchase of alcoholic beverages.
- ◆ Violation is punishable under KRS 244.990(1) as a Class B misdemeanor for the first offense, and as a Class A misdemeanor for subsequent offenses. It appears that these sanctions are available against both the purchaser and the seller of the alcoholic beverages.

House Bill 395: Credit Cards

- ◆ This bill authorizes the court clerk to accept credit and debit cards for payment of fines, forfeitures, taxes, or fees.
- ◆ Where a check is used to pay for a fine, forfeiture, tax, or fee, and is returned for insufficient funds, the clerk may

charge an amount set by a Supreme Court rule not to exceed \$25. This money goes into the General Fund.

Senate Bill 204: County detectives

- ◆ This bill amends KRS 69.360 to allow county detectives to execute civil process statewide so long as they are “certified in accordance with KRS 15.380 to 15.404.” If they are not so certified, they may serve civil process only in the county “in which the county attorney is elected.”

Senate Bill 56: Opened wine containers taken off restaurant premises Wine

- ◆ This bill allows for a person to take a resealed bottle of wine from a licensed restaurant. It allows for one opened container of wine to be taken off the premises if the customer has purchased and partially consumed the wine with a meal on the premises. The container must be resealed by the proprietor in such a way as to make it visibly apparent if it is subsequently opened or tampered with.
- ◆ The wine must be placed in a locked glove compartment, trunk, or other area not classified as a passenger area.

Senate Bill 230: Cervids

- ◆ This bill bans the importing of “cervids,” which is undefined but apparently refers to deer, reindeer, moose, elk, and similar animals. It also regulates the holding of “captive cervids.”
- ◆ Importing “members of the animal family “Cervidae” is a Class D felony.

Senate Bill 59: Homeland Security

- ◆ This bill attaches the Office of Homeland Security to the Governor’s Office.
- ◆ The office is to coordinate the efforts of the Office of Homeland Security with the efforts of the Federal Department of Homeland Security.
- ◆ The Office is established to develop a strategy to “detect, deter, mitigate, and respond to a terrorist incident,” as well as a strategy for obtaining and allocating federal homeland security funding.

Senate Bill 174: KRS 202B Amendments

- ◆ This bill amends the provisions of KRS 202B regarding the involuntary commitment of persons with mental retardation.
- ◆ This bill allows for a physician to admit any person with mental retardation who voluntarily applies for admission to an ICF/MR facility and is found to be capable of consent. The bill omitted the language “mildly or moderately mentally retarded adult person” as one who

Continued on page 16

Continued from page 15

could voluntarily be admitted.

- ◆ The bill adds a requirement for the petition that is used to begin involuntary commitment proceedings. There must be a document filed that details a psychological examination or assessment that demonstrates that a person has “moderate to severe range of mental retardation” based upon a full scale IQ. The exam must have been conducted within a reasonable time prior to the filing of the petition.
- ◆ Old law stated that the examination accompanying the petition must have been conducted by “two qualified mental retardation professionals.” This is changed to one “qualified mental retardation professional” and one “licensed psychiatrist, psychologist, or physician with special training and experience in serving individuals with mental retardation.” One of them must be from the community and one must be “an employee of a state operated ICF/MR facility.”
- ◆ Once the petition is filed, the court may require the person to be examined by the same professionals as above.
- ◆ Old law stated that between the preliminary hearing and the final hearing, the court could order the person to reside in an ICF/MR facility. This bill allows the court to order the person to reside at his or her current residence, an emergency placement “designed by the regional mental health and mental retardation program, or an ICF/MR facility.
- ◆ When an involuntary commitment is ordered, the person must be transported to an ICF/MR facility along with a document stating that there are no serious medical issues based upon a current medical examination, and that the psychological examination reveals a full scale IQ in the moderate to severe range of mental retardation.
- ◆ The bill creates a resource center established by the Kentucky Department for Mental Health and Mental Retardation to give information to “aging caregivers.” The purpose of the resource center is to “establish a centralized resource and referral center designed as a one-stop, seamless system to provide aging caregivers with information and assistance with choices and planning for long-term supports for individuals with mental retardation or developmental disability.”

Senate Bill 9: Release of homicide victim’s body to family

- ◆ This bill creates a new section of KRS Chapter 213, on “Vital Statistics.”
- ◆ If a person charged with homicide refuses to permit the burial, cremation, or other lawful disposition of the body of the deceased person, the family of the deceased person may seek a circuit court order for release of the body.
- ◆ The court must provide the homicide defendant an opportunity to be appear at a hearing personally and/or by counsel.

- ◆ The court may order release of the body to the family “if good cause is shown.”

Senate Bill 62: Practice of architecture

- ◆ KRS 323.990 is amended, to provide that the following are Class A misdemeanors:
 - Practicing architecture without a license,
 - Styling oneself as an architect, or using any words, letters, titles, or descriptions tending to convey the impression that one is an architect, without a license, and
 - Falsifying an application for certification or renewal of an architect’s license.

Senate Bill 127: Kentucky Board of Medical Licensure

- ◆ Agents of the Board are now required to obtain consent, a search warrant, or a subpoena before obtaining evidence; they will be authorized only to “interview” persons, rather than “interrogate” them. (KRS 311.605(2) is amended.)
- ◆ First-offense practicing medicine without a license is now a Class D felony. (KRS 311.990(4) is amended.)

House Bill 301: Elections and voting

- ◆ A new Class B misdemeanor is created in KRS Chapter 119 on “Election Offenses and Prosecutions.”
- ◆ It is applicable when a person provides compensation, payment, or consideration for registering voters, if the expenditure is based upon either (a) the total number of voters a person registers or (b) the total number of voters a person registers in a particular party, political group, political organization, or independent status.

House Bill 333: Maintaining the peace around funerals and burials

See above re: Senate Bill 93. ■

The tough-on-crime movement promised relief from high crime rates, unsafe streets and communities, and a drug epidemic. It has produced twenty-five years of explosive growth in the nation’s prison population and a rate of incarceration that is disgraceful in comparison to the rates of other countries.

- Professor Robert G. Lawson, *Difficult Times in Kentucky Corrections — Aftershocks of a “Tough on Crime” Philosophy*, 93 Ky. L.J. 305, 337 (2004)

KENTUCKY PUBLIC ADVOCATE ASKED TO DELIVER KEYNOTE ADDRESS AT CONFERENCE ON NEW ORLEANS PUBLIC DEFENDER SYSTEM

By Ernie Lewis, Public Advocate

On May 10-11, Yale University School of Law held a meeting on the crisis in the New Orleans criminal justice system. The Louisiana public defender system was in crisis prior to Hurricane Katrina hitting. The National Association of Criminal Defense Lawyers issued a lengthy and scathing report on the system of indigent defense in March of 2004 entitled *An Assessment of Trial-Level Indigent Defense Services in Louisiana 40 years after Gideon*. After Katrina, the system statewide and particularly in New Orleans virtually collapsed. What was a 46 lawyer office had only 6 lawyers remaining to handle the 125 new cases each day. 45 pending capital cases in the city alone had no attorney to represent the accused. Evidence and witnesses had disappeared. People were serving longer sentences than the maximum sentence were they to have been appointed an attorney and to have had their day in court. In response, the American Bar Association wrote a report in April of 2006 entitled *An Assessment of the Immediate and Longer-Term Needs of the New Orleans Public Defender System*. And, the Juvenile Justice Project of Louisiana wrote a report entitled *Treated Like Trash: Juvenile Detention in New Orleans Before, During, and After Hurricane Katrina*.

It was in this context of reform that the Kentucky public defender system was highlighted at the Yale Conference held at a retreat center just north of New Orleans. I was asked to give the keynote address at this conference. I stressed that Kentucky and Louisiana were both southern states with a

similar population, similar median income, similar poverty levels, and similar spending on indigent defense. I described for them that Kentucky was avoiding many of the problems they were experiencing with our indigent defense system. I highlighted that we had a statewide system of indigent defense with an oversight board established to guarantee independence. I told of how we had started as an assigned counsel system, moving to a predominantly contract system, and ultimately how we had completed our full-time system at the trial level. I went over each of the ABA's *Ten Principles of a Public Defense Delivery System*, and how Kentucky was meeting most of them. I noted that the Department of Public Advocacy is an independent state agency attached to the Justice and Public Safety Cabinet. I described our eligibility statute as a good one. I discussed that our primary problem was that we had far too many cases for our trial level public defenders, and that we did not have resource parity with the prosecution function. I highlighted the fact that as an agency we stressed professionalism, excellence, adherence to standards, vigorous training, a devotion to data collection, and supervision. I recommended to them to look at the Kentucky public defender system as a cost-efficient model that could deliver high quality representation so long as it was funded properly, independence was ensured, and caseloads were kept under control. ■

“If we are still part of the United States and if the Constitution still means something,” Judge Hunter wrote in an emergency order last month, “then why is the criminal justice system 11 months after Hurricane Katrina still in shambles?”

- Susan Saulny, *New Orleans Moves to Fix Its Broken Legal System*, N.Y. Times, August 7, 2006

TWO APPOINTED TO THE JUSTICE AND PUBLIC SAFETY CABINET



General Norman Arflack

Brigadier General Norman E. Arflack was appointed as the Justice and Public Safety Cabinet by Governor Ernie Fletcher June 7, 2006. Prior to the appointment, General Arflack was the deputy commander of the Kentucky Joint Force Headquarters in Frankfort, serving as an assistant and advisor to the Commanding General, Adjutant General Donald C. Storm.

He possesses significant law enforcement and corrections experience. In addition, BG Arflack has worked with federal, state and local agencies conducting counter-drug operations, both supply and demand reduction activities.

General Arflack received a bachelor's degree in law enforcement from Eastern Kentucky University in 1970 and a master's degree in public administration in 1999 from Shippensburg University. He graduated from Army War College in 1999. General Arflack is also a graduate of the Southern Police Institute at the University of Louisville.

Currently in his 23rd military assignment, General Arflack has served in a number of Command and Staff positions, including Director of Plans and Operations, Military Personnel Officer and Director of Logistics. He also previously served as Commander of the 615th Military Police Detachment's Criminal Investigative Detachment and commander of an armor Battalion at Ft. Knox.

General Arflack was mobilized for active duty October 1, 2001 to organize, train, and command National Guard personnel performing security duty in Kentucky's commercial airports subsequent to that assignment and immediately prior his current position he served as director of Joint Support Operation, collective effort between the Kentucky State Police and Kentucky National Guard to eradicate and suppress marijuana. General Arflack worked for the Kentucky State Police from 1970 until his retirement in 1993.

General Arflack has received numerous awards and decorations during his years of service, including the Meritorious Service Medal, the Army Commendation Medal (with one Bronze Oak Leaf Cluster), the Army Achievement Medal (with one Bronze Oak Leaf Cluster), the Army Reserve Component Achievement Medal (with one Silver and two Bronze Oak Leaf Clusters), the National Defense Service Medal, the Armed Forces Reserve Medal (with Gold Hourglass Device), the Army Service Ribbon and the STARC Staff Badge.

Teresa Barton, formerly the Executive Director of the Office of Drug Control Policy, was appointed to the position of Deputy Secretary of the Justice and Public Safety Cabinet by Governor Fletcher in June 2006.

Teresa was elected as Franklin County's first female Judge/Executive in 1998 and served until 2005. Her background includes serving as deputy county judge, various clerical, secretarial, and administrative positions with state agencies in Higher Education.

Deputy Secretary Barton was chosen as one of 40 Leaders under 40 by the Shakertown Roundtable in 1999, was awarded the 1999 Woman of Achievement in Government by the Frankfort Business and Professional Women and received the 2001 President's Award for First Term County Judge by the county judge/executive association. In 2003, she received the Contributions to Law Enforcement Award from the Kentucky Women's Law Enforcement Network.



Teresa Barton

Teresa received Accounting (AAS, 1988) and Business (BA, 1998) degrees from Kentucky State University.

She and her husband, John, live at Bittersweet Farms in Franklin County. They have five children with ages ranging from 16 to 36 and five grandchildren. ■

STUDY OF YEAR-LONG PILOT PROJECT SHOWS THAT KEY EYEWITNESS IDENTIFICATION REFORMS ARE EFFECTIVE

“The study of Hennepin County’s pilot project produces solid, reliable data that other cities, counties, and states should look to when considering how to improve the accuracy of eyewitness identification,” says Innocence Project Co-Director Barry Scheck

(NEW YORK; JULY 26, 2006) – Results of a new study published in an academic review show that eyewitness identification reforms advocated by a cross-section of organizations and leaders can help protect innocent people and improve the accuracy of police lineups and other identification procedures. The study is the first to use scientifically valid research techniques to evaluate the eyewitness identification reform in the field – in a “real world” application, rather than an academic setting.

Results of a year-long pilot program using blind sequential lineups – those where the official administering the lineup doesn’t know who the suspect is, and subjects are presented to the witness one at a time, rather than all together – in Hennepin County, Minnesota, are published in the new issue of the *Cardozo Public Law, Policy and Ethics Journal* at Benjamin N. Cardozo School of Law at Yeshiva University in New York. The Hennepin County Attorney’s office spearheaded the effort to improve eyewitness identification procedures, and the data was analyzed by Nancy Steblay, an eyewitness scientist at Augsburg College in Minneapolis, who co-wrote the article with Amy Klobuchar, who is now serving her second term as Hennepin County Attorney, and Hilary Lindell Caligiuri, an Assistant Hennepin County Attorney.

The article, “Improving Eyewitness Identifications: Hennepin County’s Blind Sequential Lineup Pilot Project,” reports that the scientific evaluation of the year-long pilot project resulted in fewer witnesses identifying “fillers” (or lineup subjects who are not the actual suspect), which shows that blind sequential lineups reduce the number of witnesses who guess when identifying a suspect – and reduce the number of innocent people identified in lineups.

“There is a generation worth of peer-reviewed, scientific research that demonstrates the power of blind sequential lineups to improve the accuracy of eyewitness identifications – and this study shows that when properly administered in the field, law enforcement can employ these reforms to protect the innocent and apprehend the guilty,” said Barry Scheck, Co-Director of the Innocence Project. “This is the first of what we hope will be a number of field studies that use scientifically sound techniques to evaluate blind sequential lineups.”

The year-long pilot project in Hennepin County involved four police departments (in Minneapolis, two large suburban communities, and one smaller community). The newly published article explains that while the departments were initially concerned about implementing the procedures, they all implemented creative solutions and adapted quickly – and they all embraced the study’s findings.

“This new study shows what can happen when solid reforms are implemented by open-minded police departments whose top priority is making law enforcement more effective. The result is lineups that are more accurate, which only strengthens police investigations while also protecting the innocent,” Scheck said. “The study of Hennepin County’s pilot program produces solid, reliable data that other cities, counties, and states should look to when considering how to improve the accuracy of eyewitness identification procedures.”

The Hennepin County pilot project sought to answer two questions: whether the number and quality of identifications would change with the blind sequential lineup procedure, and whether police departments could smoothly and effectively implement the procedure. “Analysis of the data and anecdotal responses from the participating police agencies led to the conclusion that the new protocol is both efficient to implement and effective in reducing the potential for misidentifications,” the *Cardozo Public Law, Policy and Ethics Journal* article says.

According to the Innocence Project, 183 people nationwide have been exonerated through DNA testing, and eyewitness misidentification was a factor in 75 percent of those wrongful convictions.

Blind sequential eyewitness identification reforms are recognized by police, prosecutorial and judicial experience, as well as national justice organizations, including the National Institute of Justice and the American Bar Association. The benefits of these reforms are corroborated by over 25 years of peer-reviewed scientific research. A range of jurisdictions – including the State of New Jersey and cities such as Winston Salem, NC, Boston, MA, and Virginia Beach, VA – have implemented the reforms as standard procedure.

For the full text of the new article in the *Cardozo Public Law, Policy and Ethics Journal*, go to:
<http://www.innocenceproject.org/docs/SteblyIDStudy.pdf> ■



Legislative Update

**Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601**

Address Services Requested

PRESORTED STANDARD
U.S. POSTAGE PAID
LEXINGTON, KY
PERMIT #1

REALIZING JUSTICE